



**Asia-Pacific
Economic Cooperation**

REPORT

Workshop on Copyright Limitations and Exceptions

■ ■ ■ April 2nd and 3rd, 2012 ■ ■ ■

Intellectual Property Experts' Group



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¹ Taking into consideration that the official language of APEC is English, this Document only contains information and presentation that are available in that language.

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Workshop Agenda



APEC - IPEG

Workshop on Copyright Exceptions and Limitations¹

2nd -3rd April 2011

Santiago, Chile

APRIL 2	
9:00 am – 9:30 am	Arrival/Registration/Coffee
9:30 am – 10:00 am	Welcome and opening remarks
9:30 am – 9:45	H.E. Mr. Luciano Cruz-Coke Minister President of the National Council for Culture and the Arts Chile
9:45 am – 10:00 am	Mr. Jorge Bunster General Director for International Economic Affairs Ministry of Foreign Affairs Chile
Session 1	The importance of limitations and exceptions within the legal framework.
10:00 am – 11:15 am	<i>This panel will explore the context of the intellectual property systems (and specifically copyright and related rights systems) in a social and economic environment, focusing on the balance between copyright and related rights protection and limitations and exceptions. Is there a basic set of copyright-based limitations and exceptions that every economy should consider?</i>
10:00 am – 10:30 am	Speaker: Mr. Mihály Ficsor <i>President of the Hungarian Copyright Experts Council Hungary</i>
10:30 am – 10:45 am	Commentators: Mr. Santiago Schuster <i>Director for Latin America International Confederation of Societies of Authors and Composers(CISAC) Chile</i>
10:45 am – 11:00 am	Ms. Carolina Sepulveda <i>Founding Partner Intangible Consulting Ltd. Chile</i>

¹ For the purpose of this Workshop, the term “copyright” also includes its related rights

11:00 am – 11:15 am	Discussion (Questions & Answers)
11:15 am – 11:35 am	Coffee Break
Session 2 11:35 am – 12:50 pm	The inclusion of limitations and exceptions in domestic law: comparative experiences. <i>The participants will share their national experiences and practical processes of achieving the balance between copyright and related rights protection and limitations and exceptions, including legislative reforms, public debate, stakeholders' participation, key case decisions and any other review processes.</i> Speaker: Ms. Nusara Kanjanakul <i>Senior IP Officer, Copyright Office Department of Intellectual Property Thailand</i> 11:35 am – 12:05 pm 12:05 pm – 12:20 pm Commentators: Mr. Daniel Alvarez <i>Research Coordinator Information Technology Law Research Centre, University of Chile Chile</i> 12:20 pm – 12:35 pm Mr. Michael Geist <i>Professor Canada Research Chair in Internet and E-commerce Law, University of Ottawa Canada</i> 12:35 pm – 12:50 pm Discussion (Questions & Answers)
12:50 pm – 3:00 pm	Lunch free
Session 3 3:00 pm – 4:15 pm	Limitations and exceptions in the digital economy. <i>As the IPEG "Report On Copyright Limitations and Exceptions in APEC Economies" pointed out, Knowledge Based Economies have developed and adapted their limitations and exceptions to the digital economy. What aspects should be considered by APEC member economies as they develop a copyright-based approach that ensures both enhancing access to knowledge and promoting the creation of creative content and knowledge?</i> 3:00 pm – 3:30 pm Speaker: Mr. Jonathan Band <i>Legal Counsel Computer & Communication Industry Association United States</i>

3:30 pm – 3:45 pm	<p>Commentators: Mr. Nelson Ávila <i>President of the Juridical Committee</i> <i>Iberian-Latin American Federation of Artists and Performers (FILAIÉ)</i> <i>Spain</i></p>
3:45 pm – 4:00 pm	<p>Mr. Rodrigo Rojas <i>Legal Counsel</i> <i>Chilean Association of Information Technologies Companies ACTI</i> <i>Chile</i></p>
4:00 pm – 4:15 pm	Discussion (Questions & Answers)
4:15 pm – 4:35 pm	Coffee break
Session 4	Fair use and fair dealing: a flexibility.
4:35 pm – 5:50 pm	<p>Technology has proven to change <i>faster than we can imagine, and therefore, maintaining a flexible yet modern legal system that can adapt to new situations is a great challenge. In this context, various doctrines, such as fair use and fair dealing, also have been adopted. This panel will explore the importance of considering these types of exceptions within domestic law, their applicability in different systems and the practical challenges they present.</i></p>
4:35 pm – 5:05 pm	<p>Speaker: Ms. Pamela Samuelson <i>Professor</i> <i>Berkeley Law School & School of Information</i> <i>University of California at Berkeley</i> <i>United States</i></p>
5:05 pm – 5:20 pm	<p>Commentators: Mr. Darren Pogoda <i>Attorney Advisor</i> <i>Office of Policy and External Affairs</i> <i>United States Patent and Trademark Office (USPTO)</i> <i>United States</i></p>
5:20 pm – 5:35 pm	<p>Mr. Claudio Magliona <i>Partner</i> <i>GarciaMagliona & Co. Lawyers</i> <i>Chile</i></p>
5:35 pm – 5:50 pm	Discussion (Questions & Answers)

6:00 pm- 7:30 pm	Reception to be held in the Panoramic Room of the Ministry of Foreign Affairs (17th floor)
APRIL 3	
Session 5 9:30 am – 10:45 am	Implementation and use of limitations and exceptions: contracts, technological protection measures and other practical issues. <i>Introducing limitations and exceptions into national law is but the starting point; using and applying them appropriately is the next step. Various questions arise, in both transactional and litigation contexts. The panellists will explore practical problems with the use of limitations and exceptions and possible solutions in practice.</i> Speaker: Mr. Lam Chung Nian <i>Partner and Head of the Intellectual Property, Media & Technology Practice Wong Partnership Singapore</i> 10:00 am – 10:15 am Commentators: Mr. Michael Geist <i>Professor Canada Research Chair in Internet and E-commerce Law, University of Ottawa Canada</i> 10:15 am – 10:30 am Mr. Rodrigo Bulnes A. <i>Member of CRUZ & CIA Abogados Business Software Alliance (BSA) representative in Chile Chile</i> 10:30 am – 10:45 am Discussion (Questions & Answers)
10:45 am – 11:05 am	Coffee Break
Session 6 11:05 am – 12:20 pm	The future path: international challenges. <i>In recent years, issues involving limitations and exceptions have gained important attention at the multilateral level. WIPO has been an active participant in these discussions. There have also been disputes at the World Trade Organization (WTO), and these issues are also being discussed in APEC. This panel will explore the contributions of multilateral organizations as well as possible future outcomes. In this context, this panel will also share ideas regarding the role of trade agreements, as relevant elements within the international scenario.</i>

11:05 am – 11:35 am	<p>Speaker:</p> <p>Ms. Geidy Lung <i>Senior Counsellor Copyright Law Division World Intellectual Property Organization (WIPO)</i></p> <p>Commentators:</p>
11:35 am – 11:50 am	<p>Mr. Darren Pogoda <i>Attorney Advisor Office of Policy and External Affairs United States Patent and Trademark Office (USPTO) United States</i></p>
11:50 am – 12:05 pm	<p>Mr. Claudio Ossa <i>Head Chilean Intellectual Rights Department (DDI), National Directorate for Libraries, Archives and Museums, Ministry of Education. Chile</i></p>
12:05 pm – 12:20 pm	<p>Discussion (Questions & Answers)</p>

Opening Remarks by H.E. Mr. Luciano Cruz-Coke,
Minister President of the National Council for Culture and the Arts, Chile

First, I would like to thank Muhamad Noor Yacon, Executive Director of the Asia Pacific Economic Cooperation Forum (APEC) and its authorities, as well as Mr. Jorge Bunster, General Director of International Economic Affairs of the Ministry of Foreign Affairs for the invitation to participate in this Workshop on Copyright Limitations and Exceptions. I would also like to mention the participation of the Intellectual Rights Department of the National Directorate for Libraries, Archives and Museums and that of renowned international specialists in the field of intellectual property, as well as prominent national experts that accompany us in what constitutes a unique opportunity to further deepen this great issue before us.

Intellectual property and copyright and related rights as an integral part of it are within the realm of culture and the arts, and are a quintessential element of creation. In effect, its consecration and promotion are a *sine qua non* condition for ensuring the proliferation and continuity of both cultural and artistic production. For this reason, The National Council for Culture and the Arts has the responsibility and the duty of ensuring that the intellectual property law contains the attributes and characteristics that are in line with the institutional mandate that the law provides the Council that I have the honor of presiding, as is “supporting the development of the arts and the dissemination of culture, contribute to the conservation, enhancing and making the Nation’s cultural heritage available to the people and promoting their participation in cultural life”.

The Government of Chile as a whole recognizes and values the need for motivating creative industries, as cornerstones of innovation, entrepreneurship and a source of employment, but also consisting of a positive externality of that being related to creation: innovation, a developed urban environment but at the same time, it is respectful of tradition and the construction of a national image that it is not just related to its landscape and geography, but to the creative capacity of its inhabitants.

It is for this reason that our creators and creative industries play a leading role in the consolidation of our economic development within the context of a global economy.

It has been over 300 years since the first time a writer’s right over his works was consecrated. Since then, the rest of the civilized world has adopted the notion that copyright is an integral part of the process that leads to progress in science and the arts, education and culture.

The world has changed considerably since the formal establishment of these rights, but the principles that inspired those rights, remain intact. And this conviction runs deep within our Government, which is completely aware of the vital importance that copyright and related rights as essential instruments for the promotion and stimulation of artistic creation and cultural development.

How do we achieve the difficult balance between the interest of creators and public access to the works?

The unavoidable responsibility and competence as far as copyright and related rights that is held by the National Council for Culture and the Arts, being the public institution that has the most direct relationship with both artistic and literary creators, faces us with a dual challenge in regards to intellectual property legislation: on one hand, safeguard and protect the right of

the creators and, on the other, create reasonable conditions so that the population can access those creations, respecting the existing legal framework.

Moreover, the regulations of the different sectorial councils connected to the audiovisual, musical and literary production that are generated and implemented within our institution, have a direct impact on copyright.

Without going any further, the current law for the Promotion of Literature and Reading establishes that resources of the fund can be assigned to the creation of integrated copyright information systems. In turn, the Audiovisual Promotion law consecrates within the faculties of the Council of the Arts and the Audiovisual Industry, the capacity of proposing the legal reforms necessary for the effective protection of copyright and intellectual property.

Beyond the above mentioned obligations that are unique to the cultural and artistic sector, the core precedent for the role of the State in the field of intellectual property in Chile is constituted by law 17.336, that was last modified in the year 2010, and which represents the most important modification in the field that has been undertaken in the area of copyright in the last 40 years; undertaken after an extensive and participative debate, process of which both cultural and artistic agents, as well as a diverse number of sectors of our society took part, seeks to effectively protect our creators, artist and intellectuals, but also contemplates a system of copyright exceptions and limitations that grant an easier access to all citizens.

In the spirit of allowing and making available the works of creators to citizens, the latest version of law 17.336 assigns the National Council for Culture and the Arts the Register of Arbitrators and Mediators in charge of fixating rates between collective rights management associations and users associations, measure that together with fortifying the role of the Council in the field of copyright also contributes to our mission of finding a fair and adequate balance between creators and users.

Additionally the 2011 – 2016 National Cultural Policy, provides a charter where the protection of copyright explicitly contemplates the promotion of studies relating to the current legislation and the promotion of new projects and legislative initiatives, outreach, the promotion of knowledge and for the compliance to copyright laws and the capacity to build public agencies to regulate the issue, and the undertaking of educational campaigns, promoting an adequate formation that spreads a generalized respect for copyright.

Sticking to the theme of this workshop, our intellectual property law establishes a framework of copyright and related rights exceptions and limitations, consistent with the system of exceptions permitted by the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Our Government promotes exceptions and limitations that seek to favor the access to cultural goods and to culture as a whole for society in general and, especially, to certain groups that are most vulnerable, thus allowing limited uses of certain protected works, like exceptions in favor of the handicapped or those that benefit public libraries and archives, seeking to obtain a greater availability of educational texts of free distribution, that constitute in our view a step forward.

In spite of the existence of an intellectual property law that contains standards that bear the same characteristics as developed economies, the new realities proposed by internet and the new platforms for the transfer of technology, translates into new challenges for the protection of copyright in the area of fixed image and creative industries. A great number of artists,

cultural managers and creators linked to culture and the arts have seen in the internet a powerful tool for the diffusion and dissemination of their works, but at the same time, they have seen their rights exposed to violations that often go unpunished. Internet Service provider immunity, although a step forward towards freedom of expression within cyberspace and the access to new technologies, constitutes a risk at the same time by not providing incentives for authors of fixed images or creative industries activities, to demand compliance to their copyright and related rights, when faced with infractions by individual internet users, which today is very difficult to enforce and has generated worldwide debates both in Europe and The United States. This illustrates the challenges that new technologies present, in a world where legal and technical mechanisms towards the protection of authors should be developed. In this context, the eventual incorporation of Technological Protection Measures into our legislation constitutes a core element and is an inevitable debate that has to take into consideration both pragmatic aspects, as well as the rights of those who produce works and that will go on to acquire new, unforeseen forms which the dazzling technological advancement will probably solve sooner than later.

Without a doubt, much is left to do on the issue of copyright and related rights. However we are steadfast on the principles above stated and our mission is to generate and implement adequate public policies in this field. A developed cultural industry cannot exist if not accompanied by an effective enforcement mechanism of rights belonging to creators and with this in mind, we are working hand in hand with them and the different associations and components of our social fabric, seeking new forms of stimulating creation and transforming author's rights into an efficient lever that pushes forward the economy of our sector, ultimately insuring its sustainability in time.

Thank you very much

Opening Remarks by Mr. Jorge Bunster
General Director for International Economic Affairs
Ministry of Foreign Affairs, Chile

Good morning,

First, I would like to welcome the Minister President of the National Council for Culture and the Arts of Chile, experts and participants both international and national; together with thanking APEC and all those that made this workshop possible.

Chile appreciates the space for dialog that APEC provides as an opportunity for exchanging experiences and promoting trade liberalization, economic integration and technical cooperation. Therefore, we have set ourselves the goal of taking advantage of the opportunities that this forum provides, through the financial support of projects of our interest. In this context, in the last two years Chile has undertaken different initiatives in areas as diverse as tourism and trade in services, and this year we are developing 3 activities, being this workshop the first of them.

As an APEC Economy, we find ourselves within a continuous process of improvements to our system of protection of intellectual property rights, strengthening the institutions in charge of those rights and providing new legal tools to the rightholders in order for them to protect their intellectual capital, this with the conviction that an adequate protection of these rights translates into an incentive both to creation and innovation.

In the same way, Chile has understood the importance of incorporating an adequate balance to the system; this is why in 2006 Chile proposed the elaboration of a Survey on Copyright Limitations and Exceptions in APEC economies. This survey, developed by the Ministry of Education, the General Directorate of International Economic Relations and different Government agencies, was transformed into an APEC publication that accounts for the reality within the region on the issue of exceptions and limitations. Today, this publication counts on twelve thousand downloads from the APEC web page, which demonstrates the relevance of the issue for our economies.

Taking the latter into account, in 2010 we proposed the activity that today commences, that has the objective of creating an adequate space to be able to share experiences and understand in which ways the economies have incorporated limitations and exceptions to their systems and which has been the evaluation of these processes.

We hope that the following two days become an important occasion for the exchange of ideas and knowledge, especially for those that visit us from abroad. We thank you for the support given to this activity; I wish you a very fruitful dialog.

Thank you very much.

General Director for International Economic Affairs

Ministry of Foreign Affairs, Chile

APEC - IPEG
Workshop on Copyright Exceptions and Limitations²

Summary Report³

I. Introduction

This activity was organized by APEC, the National Council of Culture and the Arts, the Chilean Intellectual Rights Department (DDI) of the National Directorate for Libraries, Archives and Museums of the Ministry of Education, and the General Directorate for International Economic Affairs, and was held on the 2nd and 3rd of April, 2012. The introductory notes were given by Chile's Senior Official to APEC, Mrs. Ana Novik, and opening remarks were delivered by the Minister of the National Council for Culture and the Arts, Mr. Luciano Cruz Coke and the former General Director for International Economic Affairs, Mr. Jorge Bunster.

The objective of the workshop was to address within APEC economies the issue of limitations and exceptions (L&E) to copyright and related rights, in order to create a better understanding of how the issue of limitations and exceptions has been addressed across the different economies, building on the key findings of the "Report on Copyright L&E in APEC Economies". In this respect, this workshop sought to allow the sharing of experiences and describe domestic best practices. Consequently, the information shared in this workshop could serve to aid those economies that are in the process of revising their copyright laws to include limitations and exceptions, as some of them expressed while this project was presented.

II. The Workshop Sessions

The first session, titled **"The importance of limitations and exceptions within the legal framework,"** had the objective of exploring the context of the intellectual property systems (and specifically copyright and related rights systems) in a social and economic environment, focusing on the balance between copyright and related rights protection and limitations and exceptions, and the possible basic set of copyright-based limitations and exceptions that every economy should consider.

The speaker of this session, Dr. Mihály Ficsor, Member of the Board and Honorary President of the Hungarian Copyright Council, opened the panel and identified the elements of a healthy copyright system to include: (i) Due protection and balancing of interests (rights, exceptions and limitations), (ii) Awareness building, (iii) Contractual system and collective management, and (iv) Enforcement of rights mechanisms. After giving an overview of the relevant international provisions regarding exceptions and limitations, his presentation focused on the three-step test, stating that it corresponds to three cumulative conditions that exceptions and limitations should fulfill, also determining their limits. Then, he discussed digital rights management (DRM) and technological protection measures (TPM), developing the different elements that have been discussed internationally. The first important idea was that access to works by users has always been controlled: buying tickets or other contractual arrangements have been used in order to gain access to protected works. Therefore, the use of TPMs is a common way to obtain access, subject to the payment of a reasonable price or another arrangement. In this context, he presented that the correct interpretation of the WIPO Internet treaties is that there are clear obligations to

² For the purpose of this Workshop, the term "copyright" also includes its related rights.

³ This Report is a factual summary of the presentations and key findings of the activity, and complements the specific PPT presentations delivered by the experts that you can also find in this Report.

provide “access controls” and to prohibit “preparatory acts.” Particularly with respect to the relationship with limitations and exceptions, he expressed that it is important to include provisions that allow intervention measures that help to achieve a balance. As an example, he expressed that European economies have mediation-arbitration systems (although in Hungary it almost has not been used) and that U.S. law includes specific exceptions to the prohibition on circumventing technological measures that control access (including a triennial administrative rulemaking proceeding to identify possible additional exceptions to this general prohibition, for users of classes of identified copyrighted works who are likely to be adversely affected by this general prohibition in their ability to make non-infringing uses of said identified works). Finally, with respect to special rules for developing economies, he referred to the special treatment considered in TRIPS, the Development Agenda at WIPO, as well as the Appendix to the Berne Convention. He suggested that this last element could be updated to the new reality considering the digital online technologies.

Next, the first commentator, Mr. Santiago Schuster, Director for Latin America of the International Confederation of Societies of Authors and Composers (CISAC), expressed that beyond the idea of a proper balance between right holders and users, there is a clear imbalance that affects the right holders, stating that economies should make the right decisions to protect the social role of creativity oriented jobs. He recalled that in Chile there was a long debate to achieve a final legal reform to the Copyright Act, which reflected in the end a general consensus that certain exceptions must be included. With respect to the intention of including broad exceptions, in the sense of broad “fair use” type of provisions, he expressed that they might generate problems with legal certainty, and that specificity is an important element. With respect to TPMs, he expressed that his understanding is that there was no particular interest within the Chilean Congress to regulate them, although they are included in different international agreements. He expressed that exceptions and limitations are not parallel rights from users, but mere prerogatives. Finally, he identified the challenge of the role of responsible intermediaries as contractual counterparts for authors in this new context.

Finally, the session concluded with the intervention of the second commentator, Ms. Carolina Sepúlveda, Founding Partner of Intangible Consulting Ltd. from Chile, who indicated that every right has balancing mechanisms, for example in patent law. This is also the case of copyright, where the protection system has been enhanced by the inclusion of robust IP chapter in various FTAs. These chapters only mention the three step test as a general rule, but there is still more work to be done. In this sense, more work needs to be done regarding flexibilities, especially exploring fair use type norms and revisable exceptions for TPMs circumvention, considering that it is difficult to have a limited catalogue of specific exceptions. Finally, she indicated that it is also important to consider the protection of public domain.

Session two was titled **“The inclusion of limitations and exceptions in domestic law: comparative experiences.”** The objective was that participants share their national experiences and practical processes of achieving the balance between copyright and related rights protection and limitations and exceptions, including legislative reforms, public debate, stakeholders’ participation, key case decisions and any other review processes.

The speaker for this session was Ms. Nusara Kanjanakul, Senior IP Officer, Copyright Office, from the Department of Intellectual Property from Thailand. She started her presentation by referring to the Berne Convention and the TRIPS Agreement as the international legal obligations. In 1994 the current Thai Copyright Act was enacted, which includes a catalogue of limitations and exceptions. She went on to discuss several court cases, including one where their Supreme Court clarified whether an action falls within copyright exceptions, which can be defined by both the quality and quantity of the copyrighted work. She also made reference to the work her Department carried out in issuing specific guidelines for teaching, news reporting and for computer programs. Nevertheless, there are certain challenges ahead, which originate in the broad and unclear language of the provisions, their subjective interpretation, as well as their possible application in

the digital environment. She ended her presentation referring to a draft amendment which will include limitations and exceptions for disabled persons as well as exceptions to the prohibition of the circumvention of TPMs.

The first commentator of the session, Mr. Daniel Álvarez, Research Coordinator from the Information Technology Law Research Centre, University of Chile, stated the importance of achieving a balance between protection and access. In this sense, he expressed that the original Chilean Copyright Act was not a good example, which resulted in a new reform passed in 2010 that included more exceptions, improving the balance. This reform also included provisions regarding enforcement and the limitation of Internet Services Providers liability. He expressed this was a complex process that started with an interministerial discussion, but then was opened to the public including authors, right holders, collective management organizations, cultural, entertainment and technology industries, libraries and librarians, educational institutions, NGOs, users and consumers. This discussion was in general held in the National Congress, but it also reached media, specially the Internet. This debate generated a result that achieved political consensus. Finally he indicated that in his opinion there were still missing elements that should be considered, such as exceptions for non commercial use of news, exceptions for reproduction for format shifting, exceptions for artistic and cultural heritage preservation and compulsory licenses for orphan works. There is also a need to include a clear provision that allows judges to define fair uses, following the parameters that the law could define; building upon the knowledge and experience developed under comparative law, particularly U.S. law and practice.

The second commentator, Mr. Michael Geist, Professor from the Canada Research Chair in Internet and E-commerce Law, University of Ottawa, started his intervention by expressing that international law defines the limits of the possible exceptions and limitations. In this context, there is considerable flexibility within national law in terms of implementation. He stated that currently there is an ongoing international activity, basically global scholars, working on the issue as well as the WIPO Development Agenda and the WIPO Standing Committee on Copyright and Related rights. Focusing on the Canadian case, he explained that fair dealing is the Canadian version of fair use. The Canadian Supreme Court has stated it should be interpreted broadly, covering a wide range of actions: research, private study, news reporting, criticism and review. If the category test is met, a six-factor analysis (purpose, character, amount, alternatives, nature of the work, effect) must be applied to define if the dealing is fair. In particular, judicial courts have stated that excessive control by right holders may unduly limit the ability of the public domain to incorporate creative innovation or create practical obstacles to proper utilization (2002). Moreover, they have considered fair dealing as an integral part of the Copyright Act, not just as simply a defense but more properly a user's right (2004). Among current developments, he presented the specific users exceptions included in the Bill C-11, which is still under review, and might become law by July.

The third session was titled **"Limitations and exceptions in the digital economy"**. As the IPEG "Report on Copyright Limitations and Exceptions in APEC Economies" pointed out, Knowledge Based Economies have developed and adapted their limitations and exceptions to the digital economy. This panel intended to explore aspects that should be considered by APEC member economies as they develop a copyright-based approach that ensures both enhancing access to knowledge and promoting the creation of creative content and knowledge.

The speaker for this panel was Mr. Jonathan Band, Legal Counsel of the Computer & Communication Industry Association, United States. He started his presentation by stating that copying is an inevitable feature of the digital technology. Therefore, the digital economy is built on copyright exceptions and limitations, to enable competition and the development of new digital products and services, which might compete with existing business models. In terms of competition, he identified five relevant elements for consideration. First, the concept that the expression of ideas is protected but not the ideas per se, allows competing applications. Second, temporary copies made to use a computer program are authorized under several domestic laws.

Third, decompilation/disassembly for interoperability is also present through fair use in the United States (US), the EU software directive and various economies from the region such as Australia, Hong Kong, Malaysia, New Zealand, Philippines and Singapore. Fourth, exceptions from the prohibition on circumvention of technological protection measures are also identified as a basic feature, giving specific court case examples. Fifth, the exhaustion/first sale doctrine was identified as necessary for e-commerce platforms. Regarding products and services, temporary copies (buffers/caches) was also identified as an essential feature considering the nature of the technological processes, presenting the different requirements to apply this exception. He also identified specific secondary liability limitations developed by case law that might be important where this type of liability exists. Therefore, safe harbors, both in the US and EU, and finally fair use, are relevant elements he identified for the digital economy.

The first panel commentator was Mr. Rodrigo Rojas, Legal Counsel of the Chilean Association of Information Technologies Companies (ACTI). He agreed with the idea that limitations and exceptions are essential to the digital economy. He agreed with the importance of balance, but expressed that this balance must comply with specific provisions. Chilean law, as a civil law system, is different from common law. Therefore, in this context there are risks in some of these elements for the software industry, basically with reverse engineering and fair use. Provisions between different systems are applied in a different way. Specifically fair use is difficult to be defined. Comparative law is a useful tool to develop a better understanding on these issues.

The second commentator was Mr. Nelson Ávila, President of the Juridical Committee Iberian-Latin American Federation of Artists and Performers (FILAIE) from Spain. Unfortunately, due to a last minute inconvenient he couldn't be present at the seminar. Ms. Geidy Lung of WIPO kindly participated on his behalf, based on information he provided. His written intervention began by expressing that every society has defined clear rules with the aim of assuring property rights. In this context, he indicated that intellectual property has turned into the type of property with more limitations and exceptions throughout the history of its development. First, there is a specific period of time for the right. Second, various regulations establish specific rates that right holders must follow, without the ability to deny the diffusion of works once they are published. WIPO treaties developed after years of debate, defined specific limits to the exceptions and limitations that might be applied over interpretations. Nevertheless, he stated that today the exploitation of the works is broader and requires more exceptions and limitations that go against the interests of the artists, which are not properly compensated. In his view, these actions have multiple causes; many of them might be legitimate, as access to knowledge or education, but in the end they affect right holders. Therefore these measures should not be applied at their expense, especially interpreters considered the weakest type of right holders. The digital environment allows the generation of high levels of income for specific developers. Therefore, he believes that these initiatives should pay what corresponds to providing for legal access to the works. He made a comparison with the background elements of the Rome Convention which came about due to the utilization of the phonograph and the radio. Therefore, he stated that he expects that this new crisis will achieve a new level of understanding. Finally, he expressed that clear rules should also be defined for the access and use of common goods.

The fourth session, titled **“Fair use and fair dealing: a flexibility,”** was based on the premise that technology has proven to change faster than we can imagine, and therefore; maintaining a flexible yet modern legal system that can adapt to new situations is a great challenge. In this context, various doctrines, such as fair use and fair dealing, also have been adopted. This panel explored the importance of considering these types of exceptions within domestic law, their applicability in different systems and the practical challenges they present.

The speaker, Ms. Pamela Samuelson, Professor of the Berkeley Law School & School of Information, University of California at Berkeley, United States, delivered a presentation titled “Fair use as a flexible balancing tool for the Internet age.” She began by clarifying that this statement does not

suggest that economies should repeal specific exceptions that they already have or that they should avoid new specific exceptions. Nevertheless, the rapid and unpredictable technological change demands some flexibility to be built into current copyright law, at least if economies want to promote innovation and growth in their digital economies. The main problem with rules (vs. standards) is that rules, predictable and precise, are not adaptable, therefore, a mixture of rules and standards may be desirable. In this context, fair use is not the only solution: exceptions for creative transformative uses such as user generated content, non-consumptive research or adapting the three-step test as a flexible exception, among other options, have been suggested in different reports and by different experts around the world. Focusing on the situation in the US, she explained how case law has defined that fair use fosters new technology developments, or enables the correction of market failures. Fair use is a judge-made doctrine initially, but was codified in the Copyright Act of 1976. It is applied based on (but not limited to) four factors (purpose, nature of the work, amount and substantiality and actual or potential harm to the market), for determined purposes (criticism, comment, news reporting, scholarship, research or teaching). These elements allow having a predictable standard, as their case law reflects. With respect to the rationales for fair use, there have been various arguments, but the constitutional purpose of copyright in the US is a very strong basis: works should be free to access, interact and reuse unless there is a meaningful likelihood of harm to authorial incentives to create works. Her conclusions were that fair use type provisions could be even more predictable with best practices guidelines, developed for specific creative communities. APEC economies need something like fair use to adapt their copyright laws in an era of rapid change. They are more likely to grow if local entrepreneurs know it is possible to make a case that their new uses are fair.

The first commentator, Mr. Darren Pogoda, Attorney Advisor of the Office of Policy and External Affairs, United States Patent and Trademark Office (USPTO) from United States, explained that this flexible and open-ended doctrine which is fair use is a traditional, important and ever evolving component of the US law. He explained that the four factor test contained in 17 U.S.C. § 107 is not restrictive, but merely lays out some guideposts for judicial consideration. Courts can and do consider additional factors. Courts play a key role in interpreting the doctrine and decisions regarding fair use are made on a case by case basis. With respect to the first factor, the purpose and character of the use, the relevant elements he highlighted for consideration were the commercial/non-commercial distinction and if the character of the defendant's use was "transformative" (i.e., whether the defendant's new use added something different to the original work or infused it with a different purpose or character). Regarding the third factor, the amount of the work used, he noted that fair use can be found even where the entire work has been copied. Finally, with respect to the fourth factor, the effect of the use on the market, he noted a range of factors that courts will typically analyze such as the ability of the defendant's use to serve as a replacement for the original, whether licensing mechanisms are readily available, and how easily available is the defendant's new use to the general public. He recognized that there are benefits to a flexible and evolving doctrine like fair use. Properly implemented, a fair use mechanism can produce a somewhat consistent, but still flexible mechanism for addressing disputes that may lie at the outer edges of copyright protection. A fair use mechanism may also reduce the need for the political branches government to weigh in on every limitation in every conceivable factual context. Recent fair use jurisprudence in the digital context in the United States is still evolving, but courts have found certain copies made in the context of search engine indexing to be a fair use; in another case a court rejected fair use as defense in the context of unauthorized P2P file sharing (i.e., the uploading and downloading of copyrighted works via P2P services).

The second commentator, Mr. Claudio Magliona, Partner at GarciaMagliona & Co. Lawyers from Chile, commented that he fully agreed with Professor Samuelson's statement on fair use: the digital and information age needs a balance between specific exceptions and limitations and a broader fair use exception. Technological developments move faster than Congress, and require elements such as reverse engineering to be developed and used. Copyright reform in Chile started with a general environment of non consensus regarding new limitations and exceptions, and there

was no space to think about having a fair use industry or a public domain approach. During the discussions of the bill, there was an important involvement of civil society and nonprofit groups. The bill also generated a great opposition from traditional sectors. Finally, an improved catalogue was defined, with regulated and flexible exceptions. In this last group he categorized the reverse engineering and interoperability exception, incidental temporary reproduction, parody or satire and the general incidental use exception.

The fifth session was entitled **“Implementation and use of limitations and exceptions: contracts, technological protection measures and other practical issues”**. Introducing limitations and exceptions into national law is but the starting point; using and applying them appropriately is the next step. Various questions arise, in both transactional and litigation contexts. The objective was for panelists to explore practical problems with the use of limitations and exceptions and possible solutions in practice.

The speaker of this session was Mr. Lam Chung Nian, Partner and Head of the Intellectual Property, Media & Technology Practice, Wong Partnership from Singapore. He began his intervention by giving a general introduction, including the international context, in particular the WIPO Internet treaties that set the new framework from the digital agenda. Then he referred to practical problems, starting by end-user licenses that regulate the use of copyrighted material. In general, they prohibit or curtail right of users, so the question would be if a breach of the license is a breach of the copyright or of the contract. In a specific case that was provided, the conclusion was that the breached condition must have a nexus to the licensor’s exclusive rights in order to constitute a copyright infringement. Therefore, in some cases there might be a breach of the contract, but not of the copyright (even though in the specific case there might be basis for TPM’s circumvention liability, see MDY Industries LLC vs. Blizzard Entertainment Inc.). The relationship between TPMs-RMI and L&E raise some questions: it may provide right holders with a second layer of rights, it generates some limitations on access and it may create market distortions. He went on to present Singapore situation that involves a considerable evolution of their IP laws, based on their national agenda. Through various legal instruments, they achieved a well-regarded IP regime. This system includes limitations to exclusive rights and exhaustion of rights principles strongly embraced, where legitimate parallel imports are permitted. In term of fair dealings, Singapore recently amended its Copyright Act to include U.S. style fair use concepts as additional basis for fair dealing defense, broader than the original provision. Additionally there are contractual limitations primarily in relation to software licenses, in order to guarantee the possibility to make backups and study or testing its functioning, among other things. Further, Singapore has specific exceptions for TPMs circumvention, and their Minister of Law has the authority to exclude specific uses. He further developed other case law, highlighting the important role of courts. Finally he expressed that there is a continuing need to ensure that technology does not out-pace public interest balances in the copyright system. Additionally, contractual limitations, TPM and DRM technologies may impose real limits on exercise of limitations and access to material. L&E framework needs to evolve but more needs to be done for clarity. There is clearly a continuing need to balance interests.

The first commentator, Mr. Michael Geist, focused on the flexibility in implementing TPM protection. He analyzed the legislative history of the WIPO Treaties, which concluded in a general and broad provision. Therefore, these treaties are intentionally flexible. Then he commented the implementations defined by the US and Canada. He expressed that there are several economies that implement the provisions establishing a link between circumvention and the infringement, like New Zealand, Switzerland and India. There are also other specific types of exceptions in other economies. Therefore, there is a possibility to address consumers concerns and implement correctly establishing limitations and exceptions compliant with the treaties.

The second commentator was Mr. Rodrigo Bulnes A. Member of Cruz & Co Lawyers, Business Software Alliance (BSA) representative in Chile. He focused his presentation on Chilean law regarding limitations and exceptions for reverse engineering and the relationship with TPMs,

considering the obligations established in the US Chile Free Trade Agreement. He compared the provision that allows the reverse engineering exception for copyright in Chilean law, with the specific provision of the FTA regarding the exception to the circumvention of TPMs for reverse engineering purposes. He presented some questions regarding the relationship between these two issues.

The sixth and final session, was titled **“The future path: international challenges.”** In recent years, issues involving limitations and exceptions have gained important attention at the multilateral level. WIPO has been an active participant in these discussions. There have also been disputes at the World Trade Organization (WTO), and these issues are also being discussed in APEC. This panel will explore the contributions of multilateral organizations as well as possible future outcomes. In this context, this panel will also share ideas regarding the role of trade agreements, as relevant elements within the international scenario.

The speaker was Ms. Geidy Lung, Senior Counselor of the Copyright Law Division, World Intellectual Property Organization (WIPO). She began by presenting the work done by WIPO regarding norm setting activities, cooperation for development and services. The work developed under the Standing Committee on Copyright and Related Rights (SCCR) had been based in four principles: member-driven to support constituents, the balance between the interests of creators and users, a flexible approach and inclusive process, the inclusion of different sectors. The concrete work has led to the development of the Berne and Rome Conventions, the Internet Treaties (WCT and WPPT). Currently work is being developed to attend the needs of persons with disabilities, libraries and archives and educational institutions, in terms of limitations and exceptions. Important work has been developed by the Stakeholders’ Platform Regarding the VIP Initiative. The trusted intermediary global accessible resources (TIGAR) project aims to facilitate the access of works. In terms of norm setting, there is a working document regarding an international instrument that is being negotiated under the SCCR. Regarding libraries and archives there is a provisional working document that contains comments and textual suggestions towards an international legal instrument, based on eleven topics that have been identified for discussion. Finally, limitations and exceptions for educational and research institutions, will be reviewed at the next SCCR, in July 2012.

The first commentator of this panel was Mr. Darren Pogoda. He noted that the US is simultaneously committed to both sound limitations and exceptions and effective enforcement mechanisms. He noted that these two elements are part of the balance necessary in any well functioning copyright system; such a copyright regime must support both the creation of works and the dissemination of the expression and knowledge contained in those works. A robust copyright system contains strong exclusive rights as well as limitations and exceptions of those rights; both are compatible, indeed necessary, to provide the appropriate balance of copyright. Developing copyright literacy amongst the general public is a vital part of the process. Finally, he stressed embracing effective protection for technological protection measures will be critical to enabling new distribution models that can simultaneously reward authors for their efforts and investments and provide the public greater access to legitimate (non-infringing) works at different price points. In the international arena, he noted that reaching some kind of positive conclusion on the broader print disabilities issues is a priority for the United States and that the United States shares the common goal of establishing new legal norms for copyright exceptions in this area. Mr. Pogoda also stressed that the type of comparative studies and research being conducted, produced and funded by WIPO in this arena are vital foundations for the development of international norms in any area of copyright (but particularly the field of limitations and exceptions where the majority of standards exist at the domestic level).

The second commentator was Mr. Claudio Ossa, Head of the Chilean Intellectual Rights Department (DDI), National Directorate for Libraries, Archives and Museums, Ministry of Education. He began his presentation expressing that human beings are the ones that generate the creative

content, and therefore constitute the essential element for the development of creative industries. The balance between exclusive rights and public interest generates important challenges, namely: certainty, transparency, traceability and networking. It is clear that the evolution of knowledge is based on what others have done before. Nevertheless, the current scenario is much more dynamic than it was in the past, and this means that there is a clear need for adapting. The opportunities are there to harmonize the different interests; to promote the use of TICs that incentivize the expression and creativity, promote access, allow safe transactions and respect for user's privacy; and to develop TICs related to management systems that facilitate due compensation for the use of contents. In terms of traceability, the role of Copyright registers is basic. Well implemented processes can achieve the proper identification of works, and that is an important goal.

III. Concluding remarks

There was a general consensus that limitations and exceptions are a basic element, among others, for a healthy copyright system. Nevertheless, different approaches arise when characterizing or categorizing these elements as defenses, exceptions, prerogatives or rights of the users. There was also a common view expressed at this Workshop that the international framework establishes the conditions and limits for exceptions and limitations, and that within this framework, economies are free to define the elements that are suitable for their system and compliant with international standards. International multilateral developments will help to define the most critical cases and ways to address them.

It is clear that the Copyright regimes keep evolving in this area with various ongoing legislative processes. Therefore, the answer for many of the challenges that limitations and exceptions raise are still being explored by policy-makers. There is a common understanding that we are facing a new reality that needs special attention: copying is an inevitable feature of internet technologies and therefore, adequate limitations and exceptions are essential. At the same time, there is a concern that artists should not bear the costs of these limitations and exceptions.

Many experts considered fair use as a flexible and important component of a well-functioning copyright system. The way flexible provisions are drafted may vary from country to country, and predictability can be improved with adequate legislation and best practices guidelines. Nevertheless, some of the experts raised questions regarding how this doctrine could be applied in civil law countries. At the same time, there were different views regarding the scope and application of the reverse engineering exception, regarding the importance of the conditions and requirements that are defined to benefit from that exception as well as the positive effects of this exception for the development of new technologies and solutions. The adequate consideration of different views relating to the scope and conditions to exercise limitations and exceptions in the copyright arena is a critical component of any legal and economic scheme that seeks to promote and nurture technological innovation.

The relationship between limitations and exceptions and the protection of technological protection measures was a topic addressed in depth during the Workshop. Different views were expressed regarding their historical background and the specific methods of implementing TPM protection at the national level. Different economies are in the process of amending their law regarding TPMs. There seemed to be agreement that protection for TPMs plays an important and vital role in the digital environment, and that APEC members need to consider measures that will ensure adequate protection and effective legal remedies for TPMs as required by the WIPO Treaties, as well as adequate measures to ensure that their protection will not hinder the balance between right holders and users.

In conclusion, many issues related to limitations and exceptions were discussed at the Workshop. Participants agreed that limitations and exceptions are an important part of the international

approach to copyright balance and a critical part of national copyright laws. On the path to developing Innovative Growth in APEC Economies, it will be important to keep exchanging views regarding all aspects of copyright law and policy.